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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

~~No. 304.~~ 35

THE BALTIMORE AND POTOMAC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 18, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Summons.*

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA, Plaintiff,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY, Defendant.
} At Law. No. 16783.

[Seal Supreme Court of the District of Columbia.]

he President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on the first day of its special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk*,
[SEAL.] By J. R. YOUNG, *Ass't Clerk.*

BIRNEY & BIRNEY.

NOTE.—The special terms of this court commence on the first Tuesday of every month except August, in which month there is no term of the court.

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant, O. A. Stevens, ag't of Co., the 20 day of Nov., 1876.

ALEX. SHARP, *Marshal.*

Declaration.

In the Supreme Court of the District of Columbia, the — day of November, A. D. 1876.

THE DISTRICT OF COLUMBIA,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY.
} At Law. No. 16783.

The plaintiff sues the defendant, a corporation created by an act of the General Assembly of Maryland, entitled An act to incorporate the Baltimore and Potomac Railroad Company, passed May 2 6th, A. D. 1853, and doing business in the District of Columbia, for money payable by the defendant to the plaintiff, for that whereas heretofore, to wit, on the 14th day of October, A. D. 1871, and for a long time prior thereto, there was and still is a certain common and public highway in the city of Washington, in the District of Columbia, called "K" street southeast; and whereas the said plaintiff was and is bound to keep the said highway in such condition and repair as to render it safe and convenient for passage on, over, and across the same; and whereas the said defendant, at and prior to the said date, was duly authorized to make and did

make and cause to be made on the said "K" street between Sixth and Seventh streets southeast a certain hole, pit, trench, and excavation, for the purpose of constructing its road and laying its track along the said "K" street; and whereas the said defendant then and there promised and undertook to and with the said plaintiff to make and cause to be made the said hole, pit, trench, and excavation carefully and in such manner as to guard and secure the same agains accident to persons lawfully, carefully, and moderately passing alon and over the said street, and to cover and enclose the said excav tion by proper fences, barriers, and barricades when left open aft sunset, and to guard the same by proper lighted lamps and lanterns, signal or signals, to warn persons passing along the said street of the existence and location of the said pit and excavation and to save the said plaintiff harmless from any loss or damage which should or might accrue from any failure of the said defendant to perform its contract and duty as aforesaid; and whereas afterwards, to wit, on the said 14th day of October, A. D. 1871, one William Barnes, a citizen of said District, while walking moderately along, over, and across the said "K" street between Sixth and Seventh streets southeast in the night time slipped and fell into the said hole, pit, trench, and excavation, which was then and there and for a long time had been by the said defendant left open, unguarded, and unprotected, as aforesaid, whereby the said William Barnes suffered great loss and damage to his person, for which he afterwards, to wit, on the 16th day of January, A. D. 1872, brought his action against the said plaintiff in the supreme court of said District and recovered therein a judgment against said plaintiff for a large sum of money, to wit, the sum of $3,500, which, together with $652.26 interest and $173.09 costs, amounting in all to $4,325.35, the said plaintiff was afterwards, to wit, on the 29th day of April, A. D. 1876, compelled to pay to the said William Barnes by virtue of the judgment aforesaid; and whereas the said defendant then and there, to wit, on the said 29th day of April, A. D. 1876, at the District aforesaid, faithfully promised and undertook to repay to the said plaintiff the said sum of $4,325.35, which the said plaintiff had been compelled to pay as aforesaid, yet, nevertheless, the said defendant, although often
requested so to do, has hitherto wholly neglected and refused
3. and still neglects and refuses to pay the said sum of money
or any part thereof, to the damage of the said plaintiff of
$4,325.35, and therefore the said plaintiff brings its suit.

2. The plaintiff sues the defendant for money payable by the defendant to the plaintiff, for money lent by the plaintiff to the defendant, and for money paid by the plaintiff for the defendant, at its request, and for money found to be due from the defendant to the plaintiff on account stated between them, and the plaintiff claims $4,325.35, with interest thereon from said 29th day of April, A. D. 1876, and the costs of this suit.

BIRNEY & BIRNEY,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court, occurring twenty days after service hereof; otherwise judgment.

BIRNEY & BIRNEY,
Attorneys for Plaintiff.

DISTRICT OF COLUMBIA, *ss:*

Seth L. Phelps, commissioner of the District of Columbia, being uly sworn, says that the cause of action herein is the sum of $4,325.35, id by the plaintiff, as set forth in the declaration, and that the ts stated in said declaration are true, to the best of this deponent's information and belief, and that there is justly due and payable by the defendant to the said plaintiff the said sum of $4,325.35, with interest thereon and costs, as claimed in said declaration, exclusive of all set-offs and just grounds of defence.

S. L. PHELPS,
Commissioner of the District of Columbia.

Subscribed and sworn to before me this the eighteenth day of November, A. D. 1876.

WM. TINDALL, [SEAL.]
Justice of the Peace, D. C.

Filed Nov. 18, 1876.

Affidavit and Pleas.

In the Supreme Court of the District of Columbia.

DISTRICT OF COLUMBIA
vs.
BALTIMORE AND POTOMAC RAILROAD COMPANY.
} At Law. No. 16783.

I, George C. Wilkins, on oath say that I am the superintendent
of the Baltimore and Potomac Railroad Company, and was such
superintendent on and before 29th April, 1876; that to the best of
my knowledge, information, and belief the said company
4 never promised or undertook to pay the plaintiff the sum of
$4,325.35, as averred in the declaration, nor any part thereof,
nor did any agent of the company do so.

GEO. C. WILKINS, *Sup't.*

Subscribed and sworn to before me this 17th day of January, 1877.

[SEAL.] G. E. SANGSTON,
Notary Public.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY.
} At Law. No. 16783.

For pleas to the first count of the plaintiff's declaration the defendant says:

make and cause to be made on the said "K" street between Sixth and Seventh streets southeast a certain hole, pit, trench, and excavation, for the purpose of constructing its road and laying its track along the said "K" street; and whereas the said defendant then and there promised and undertook to and with the said plaintiff to make and cause to be made the said hole, pit, trench, and excavation carefully and in such manner as to guard and secure the same agains accident to persons lawfully, carefully, and moderately passing alon and over the said street, and to cover and enclose the said excav tion by proper fences, barriers, and barricades when left open aft sunset, and to guard the same by proper lighted lamps and lanterns, signal or signals, to warn persons passing along the said street of the existence and location of the said pit and excavation and to save the said plaintiff harmless from any loss or damage which should or might accrue from any failure of the said defendant to perform its contract and duty as aforesaid; and whereas afterwards, to wit, on the said 14th day of October, A. D. 1871, one William Barnes, a citizen of said District, while walking moderately along, over, and across the said "K" street between Sixth and Seventh streets southeast in the night time slipped and fell into the said hole, pit, trench, and excavation, which was then and there and for a long time had been by the said defendant left open, unguarded, and unprotected, as aforesaid, whereby the said William Barnes suffered great loss and damage to his person, for which he afterwards, to wit, on the 16th day of January, A. D. 1872, brought his action against the said plaintiff in the supreme court of said District and recovered therein a judgment against said plaintiff for a large sum of money, to wit, the sum of $3,500, which, together with $652.26 interest and $173.09 costs, amounting in all to $4,325.35, the said plaintiff was afterwards, to wit, on the 29th day of April, A. D. 1876, compelled to pay to the said William Barnes by virtue of the judgment aforesaid; and whereas the said defendant then and there, to wit, on the said 29th day of April, A. D. 1876, at the District aforesaid, faithfully promised and undertook to repay to the said plaintiff the said sum of $4,325.35, which the said plaintiff had been compelled to pay as aforesaid, yet, nevertheless, the said defendant, although often requested so to do, has hitherto wholly neglected and refused
3 and still neglects and refuses to pay the said sum of money or any part thereof, to the damage of the said plaintiff of $4,325.35, and therefore the said plaintiff brings its suit.

2. The plaintiff sues the defendant for money payable by the defendant to the plaintiff, for money lent by the plaintiff to the defendant, and for money paid by the plaintiff for the defendant, at its request, and for money found to be due from the defendant to the plaintiff on account stated between them, and the plaintiff claims $4,325.35, with interest thereon from said 29th day of April, A. D. 1876, and the costs of this suit.

BIRNEY & BIRNEY,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court, occurring twenty days after service hereof; otherwise judgment.

BIRNEY & BIRNEY,
Attorneys for Plaintiff.

District of Columbia, *ss:*

Seth L. Phelps, commissioner of the District of Columbia, being duly sworn, says that the cause of action herein is the sum of $4,325.35, aid by the plaintiff, as set forth in the declaration, and that the cts stated in said declaration are true, to the best of this deponent's information and belief, and that there is justly due and payable by the defendant to the said plaintiff the said sum of $4,325.35, with interest thereon and costs, as claimed in said declaration, exclusive of all set-offs and just grounds of defence.

S. L. PHELPS,
Commissioner of the District of Columbia.

Subscribed and sworn to before me this the eighteenth day of November, A. D. 1876.

WM. TINDALL, [SEAL.]
Justice of the Peace, D. C.

Filed Nov. 18, 1876.

Affidavit and Pleas.

In the Supreme Court of the District of Columbia.

District of Columbia
vs.
Baltimore and Potomac Railroad Company.
} At Law. No. 16783.

I, George C. Wilkins, on oath say that I am the superintendent
of the Baltimore and Potomac Railroad Company, and was such
superintendent on and before 29th April, 1876; that to the best of
my knowledge, information, and belief the said company
4 never promised or undertook to pay the plaintiff the sum of
$4,325.35, as averred in the declaration, nor any part thereof,
nor did any agent of the company do so.

GEO. C. WILKINS, *Sup't.*

Subscribed and sworn to before me this 17th day of January, 1877.

[SEAL.] G. E. SANGSTON,
Notary Public.

In the Supreme Court of the District of Columbia.

The District of Columbia
vs.
The Baltimore and Potomac Railroad Company.
} At Law. No. 16783.

For pleas to the first count of the plaintiff's declaration the defendant says:

1. That it never promised nor undertook as alleged.
2. That it never was indebted as alleged.
3. That the alleged cause of action did not accrue within one year before this suit.
4. That the alleged cause of action did not accrue within three years before this suit.
5. That the injury to said Barnes, which is mentioned in said count, was caused partly or entirely by the negligence of the plaintiff.

And for pleas to the second count of the plaintiff's declaration the defendant says:

1. That it never was indebted as alleged.
2. That the alleged cause of action did not accrue within three years before this suit.

A. S. WORTHINGTON,
Attorney for Defendant.

Filed Jan. 18, 1877.

Joinder of Issue on Pleas.

In the Supreme Court of the District of Columbia.

District of Columbia
vs.
Baltimore and Potomac Railroad Company. } At Law. No. 16783.

The plaintiff joins issue upon the defendant's pleas.

BIRNEY & BIRNEY,
Attorneys for Pl'ff.

Filed Jan. 23, 1877.

5 *Note of Issue.*

In the Supreme Court of the District of Columbia.

The District of Columbia
vs.
The Baltimore and Potomac Railroad Company. } At Law. No. 16783.

The clerk will please place above case on calendar for next term of court.

A. G. RIDDLE,
Attorney for Plaintiff.

Plaintiff's attorney, A. G. Riddle; defendant's attorney, Enoch Totten.

Date of last pleading, May 21, 1878. Filed May 21, 1878.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said district, commencing the fourth Monday, the 24th day, of January, A. D. 1881.

MONDAY, *January* 24, 1881.

By order of Arthur MacArthur, justice, one of the justices of said upreme court, presiding, the court is opened by proclamation of he marshal, pursuant to rule of court.

WEDNESDAY, *March* 23, 1881.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

6 THE DISTRICT OF COLUMBIA, Pl'ff,
vs.
THE BALTIMORE & POTOMAC R. R. Co., Def't. } At Law. No. 16783.

Now comes here as well the plaintiff, by its attorney, Mr. Riddle, as the defendant, by its attorney, Mr. Totten, and a jury of good and lawful men of this District, to wit: Samuel J. Spearing, James M. Darnell, George H. Thompson, David B. Jackson, John E. Zugg, Cato Ward, Cornelius T. Bowen, James T. Harrison, George W. Brooks, William G. Toliver, Charles S. Johnson, and John R. Ross, who, being duly sworn to try the issue above joined, after hearing the evidence in the case, on their oath say they find said issue in favor of the plaintiff, and that the money payable to it by the defendant by reason of the premises is four thousand three hundred and twenty-five dollars and thirty-five cents, with interest thereon from April 29th, 1876, besides costs. Therefore it is considered that the plaintiff recover against said defendant four thousand three hundred and twenty-five dollars and thirty-five cents, with interest as aforesaid found, being the money payable by it to the
7 plaintiff by reason of the premises, and $44.30 for its costs of suit, and have execution thereof.

8 *Motion for New Trial on Exceptions.*

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
THE BALT. & POT. R. R. Co. } Law. No. 16783.

And now comes the said defendant and moves the court for a new trial on exceptions.

ENOCH TOTTEN,
Att'y for Def't.

Bond on appeal waived March 25th, 1881.

RIDDLE,
Att'y D. C.

Filed March 25, 1881.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY. } Law. No. 16783

This cause having come on for hearing, and a jury having b empannelled, the counsel for the plaintiff opened his case to jury, and thereupon, to prove the issues on the plaintiff's part, gave in evidence to the jury the declaration in a certain cause in the supreme court of the District of Columbia, wherein one William Barnes was plaintiff and the District of Columbia was de-
9 fendant (being cause at law No. 9239 in the supreme court of the District of Columbia), which is in the words and figures following, to wit:

"In the Supreme Court of the District of Columbia, the 16th day of January, A. D. 1872.

"WILLIAM BARNES, Plaintiff,
vs.
"THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. —.

"The plaintiff sues the defendant for money due and payable by the defendant to the plaintiff, for that whereas, on the date hereinafter mentioned and for a long time prior thereto, there was and still is a certain common and public highway in the city of Washington, in the District of Columbia, called F street south or southeast, which was and is used as such highway by the good citizens of the United States for passing and repassing on and over the same, on foot as well as otherwise; and whereas said defendant, well knowing the premises, was bound to keep said highway in such condition as to render it safe and convenient for passage and transit as aforesaid on, over, and across the same; yet, nevertheless, the plaintiff alleges that heretofore, to wit, on the 14th day of October, A. D. 1871, the said highway was out of repair and in a dangerous and unsafe condition by reason of the gross negligence and default of the defendant, of all of which the said defendant had notice; yet, nevertheless, to wit, on the day and year last aforesaid, at the county aforesaid, in the city and District aforesaid, the said defendant, not performing and regarding its duty as aforesaid, wrongfully and negligently permitted and allowed the public highway or street as aforesaid to be and remain in a dangerous and unsafe condition unguarded, and without fixing or placing, or causing to be fixed or placed, any light or lights, signal or signals, barricade, or other warning at or near the deep, dangerous, and great excavation in said street, between 6th and 7th streets east or southeast, in said city or District, to denote or show that the same was so there as aforesaid, and made no effort to secure the same against accident, or to warn persons passing along said public or common highway or street of the existence of said excavation or deep pit, by means of and in consequence of which gross negligence and failure of defendant to perform its duty in that respect aforesaid the plaintiff then and there, to wit, on the day and year aforesaid, in the night time, while walking moderately and carefully along and across said street or highway, along the north side thereof, and between the streets aforesaid, slipped and fell into a deep pit, excavation, hole, or trench which was then and there, and for a long time had been, in the street aforesaid between the streets aforesaid, left open, unguarded, and unprotected in any manner whatsoever as aforesaid through the gross negligence and default of the defendant, whereby the bone or bones of the plaintiff's right leg, near the ankle, became and were broken or fractured, sprained and bruised and otherwise injured, and whereby the plaintiff's ankle-joint was rendered weak and unsound, and the plaintiff unable to use his leg and ankle-joint without great pain and weakness therein, and so, by means of said injury, the plaintiff became and was sick, lame, and disordered for a long space of time, during which he suffered, and still suffers, great pain, and was and is hindered and prevented from attending to his necessary and lawful business, and was and is deprived of divers gains and profits, and was obliged to expend large sums of money, to wit, $1,000, in and about endeavoring to be healed and cured of said fractures, bruises, and injuries as aforesaid, and is permanently incapacitated and rendered unable to transact and attend to his lawful business, and is also seriously and permanently injured in his bodily health and strength, to the great damage of the plaintiff in the sum of thirty thousand ($30,000) dollars, and therefore he brings his suit.

"R. K. ELLIOT,
"*Plaintiff's Att'y.*

"The defendant is to plead hereto on or before the first special term of the court, occurring twenty days after service hereof; otherwise judgment.

"R. K. ELLIOT,
"*Plaintiff's Att'y.*"

And that the District of Columbia, by its counsel, filed a plea of "not guilty," and that the issue was thereupon joined, and that on the 19th day of March, 1873, a jury was called and sworn in that cause in the supreme court of the District of Columbia, holding a circuit court, the chief justice presiding, and that the said trial continued until the 21st day of March, 1873, when a verdict was rendered by the jury in favor of the said plaintiff, William Barnes, and against the said defendant, The District of Columbia, for the sum of $3,500.00, and thereupon judgment was rendered against the said District in favor of the said plaintiff for the said sum of $3,500.00, with the sum of $63.50 for his costs; and that subsequently a motion for a new trial on exceptions was made, and the cause came on for hearing in the general term on the 10th day of November, 1873, and that the said judgment was vacated and set aside, and the cause remanded to the circuit court for a new trial,

Bill of Exceptions.

In the Supreme Court of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY.
} Law. No. 16783

This cause having come on for hearing, and a jury having b
empannelled, the counsel for the plaintiff opened his case to
jury, and thereupon, to prove the issues on the plaintiff's part, gave
in evidence to the jury the declaration in a certain cause in the
supreme court of the District of Columbia, wherein one William
Barnes was plaintiff and the District of Columbia was de-
9 fendant (being cause at law No. 9239 in the supreme court
of the District of Columbia), which is in the words and figures
following, to wit:

"In the Supreme Court of the District of Columbia, the 16th day of January, A. D. 1872.

"WILLIAM BARNES, Plaintiff,
vs.
"THE DISTRICT OF COLUMBIA, Defendant.
} At Law. No. —.

"The plaintiff sues the defendant for money due and payable by the defendant to the plaintiff, for that whereas, on the date hereinafter mentioned and for a long time prior thereto, there was and still is a certain common and public highway in the city of Washington, in the District of Columbia, called K street south or southeast, which was and is used as such highway by the good citizens of the United States for passing and repassing on and over the same, on foot as well as otherwise; and whereas said defendant, well knowing the premises, was bound to keep said highway in such condition as to render it safe and convenient for passage and transit as aforesaid on, over, and across the same; yet, nevertheless, the plaintiff alleges that heretofore, to wit, on the 14th day of October, A. D. 1871, the said highway was out of repair and in a dangerous and unsafe condition by reason of the gross negligence and default of the defendant, of all of which the said defendant had notice; yet, nevertheless, to wit, on the day and year last aforesaid, at the county aforesaid, in the city and District aforesaid, the said defendant, not performing and regarding its duty as aforesaid, wrongfully and negligently permitted and allowed the public highway or street as aforesaid to be and remain in a dangerous and unsafe condition unguarded, and without fixing or placing, or causing to be fixed or placed, any light or lights, signal or signals, barricade, or other warning at or near the deep, dangerous, and great excavation in said street, between 6th and 7th streets east or southeast, in said city or District, to denote or show that the same was so there as aforesaid, and made no effort to secure the same against accident, or to warn persons passing along said public or common highway or street of the existence of said excavation or deep pit, by means of and in consequence of which gross negligence and failure of defendant to perform its duty in that respect aforesaid the plaintiff then and there, to wit, on the day and year aforesaid, in the night time, while walking moderately and carefully along and across said street or highway, along the north side thereof, and between the streets aforesaid, slipped and fell into a deep pit, excavation, hole, or trench which was then and there, and for a long time had been, in the street aforesaid between the streets aforesaid, left open, unguarded, and unprotected in any manner whatsoever as aforesaid through the gross negligence and default of the defendant, whereby the bone or bones of the plaintiff's right leg, near the ankle, became and were broken or fractured, sprained and bruised and otherwise injured, and whereby the plaintiff's ankle-joint was rendered weak and unsound, and the plaintiff unable to use his leg and ankle-joint without great pain and weakness therein, and so, by means of said injury, the plaintiff became and was sick, lame, and disordered for a long space of time, during which he suffered, and still suffers, great pain, and was and is hindered and prevented from attending to his necessary and lawful business, and was and is deprived of divers gains and profits, and was obliged to expend large sums of money, to wit, $1,000, in and about endeavoring to be healed and cured of said fractures, bruises, and injuries as aforesaid, and is permanently incapacitated and rendered unable to transact and attend to his lawful business, and is also seriously and permanently injured in his bodily health and strength, to the great damage of the plaintiff in the sum of thirty thousand ($30,000) dollars, and therefore he brings his suit.

"R. K. ELLIOT,
"*Plaintiff's Att'y.*

"The defendant is to plead hereto on or before the first special term of the court, occurring twenty days after service hereof; otherwise judgment.

"R. K. ELLIOT,
"*Plaintiff's Att'y.*"

And that the District of Columbia, by its counsel, filed a plea of "not guilty," and that the issue was thereupon joined, and that on the 19th day of March, 1873, a jury was called and sworn in that cause in the supreme court of the District of Columbia, holding a circuit court, the chief justice presiding, and that the said trial continued until the 21st day of March, 1873, when a verdict was rendered by the jury in favor of the said plaintiff, William Barnes, and against the said defendant, The District of Columbia, for the sum of $3,500.00, and thereupon judgment was rendered against the said District in favor of the said plaintiff for the said sum of $3,500.00, with the sum of $63.50 for his costs; and that subsequently a motion for a new trial on exceptions was made, and the cause came on for hearing in the general term on the 10th day of November, 1873, and that the said judgment was vacated and set aside, and the cause remanded to the circuit court for a new trial,

and that subsequently, and on the 6th day of December, 1873,
the judgment was reconsidered and modified, and it was ordered
and adjudged that the said plaintiff, William Barnes, take noth-
ing by his suit, and that the defendant go thereof without day;
whereupon a writ of error was sued out by the said Willia
Barnes, and the cause taken thereon to the Supreme Court
11 the United States, and afterwards, to wit, on the 20th day
March, 1876, the judgment of the general term was reve
and the judgment of the circuit court reinstated; and that
wards, to wit, on the 29th day of April, 1876, the said Distri
Columbia paid the said judgment, with interest thereon and costs,
to wit, for the amount of the said judgment, $3,500.00; for the amount
of interest, $652.26, and for the amount of costs, $173.09; and it was
agreed and stipulated between counsel for the respective parties that
the record, as set out in this bill of exceptions, of the case of Barnes
vs. The District of Columbia, should be taken and considered as the
entire record of said case.

Thereupon the plaintiff in this cause, by its counsel, gave evidence to the jury tending to show that on or about the 14th day of October, 1871, the said William Barnes, in the night time, passing along one of the streets of Washington, to wit, K street, walked over the north wall of the tunnel which was then being constructed by the defendant, The Baltimore and Potomac Railroad Company, and fell into the excavation made by said company and was seriously injured, for which he recovered the said judgment, and that the money had been paid to him, the said William Barnes. It was conceded to be a fact in the case that on the 31st day of May, 1870, the board of aldermen and board of common council of the city of Washington passed an ordinance in the words and figures following, to wit:

"*Resolution of the Board of Aldermen and Board of Common Council of the City of Washington.*

"Whereas a charter has been granted by the Senate and House of Representatives of the United States of America to the Baltimore and Potomac Railroad Company to construct their railroad to and within the city of Washington, District of Columbia, by act approved Feb. 5, 1867;

"And whereas they did further, by supplemental acts approved March 18, 1869, and March 25, 1870, grant to the said Baltimore and Potomac Railroad Company the option of two lines in the city of Washington—one by Virginia avenue, K street, &c., and the other by North Carolina and Virginia avenues, &c.—the said Baltimore and Potomac Railroad Company having now selected the Virginia avenue and K street route do herewith make application to the mayor, board of aldermen, and board of common council of the city of Washington for liberty to construct their railroad upon the Virginia avenue and K street route in conformity with the accompanying plat:

"Therefore be it resolved by the board of aldermen and board of common council of the city of Washington, That the Baltimore and

Potomac Railroad Company be permitted to construct that portion of their railroad entering into and within the city of Washington at a point on the northern shore of the Eastern Branch of
12 the Potomac river, between South L and M streets, as set forth
in the accompanying plans and profiles; thence running westwardly between said streets to the intersection of Virginia avenue with South L and East Twelfth streets; thence along said Virginia avenue, by a tunnel under the surface, northwestwardly to East Third street; thence along south K street westwardly to East Third street; thence, by a line curving to the right to either the north or south bank of the canal, northwestwardly to Virginia avenue; thence along Virginia avenue northwestwardly to the intersection of South C and West Ninth streets; and they are also permitted to change the grade of certain streets at certain points, as designated on said profiles and plans, so that the grades shall conform to the blue figures on said plan, and shall be so laid down upon the books in the city surveyor's office as the established grades.

"Provided, however, That any street or avenue under which the said railroad may pass shall be bridged or otherwise covered by the said company at their proper expense, and whenever sewers, gutters, curbstones, or sidewalks, or flag footways, gas or water pipes are disturbed or moved by the said company the same shall be rebuilt in a proper and satisfactory manner, at the expense of said railroad company and without cost or loss to any citizen or to the corporation of Washington.

"Approved May 31st, 1870."

The counsel for the plaintiff further gave evidence to the jury tending to show that before the trial of the said cause of William Barnes *vs.* The District of Columbia notice was served upon the proper officers of the Baltimore and Potomac Railroad Company requiring and requesting the said company to appear and defend the said cause.

And there the plaintiff rested.

Upon this state of facts the counsel for the defendant, The Baltimore and Potomac Railroad Company, asked the court to hold and decide that neither privity nor the relation of superior and inferior existed between the Baltimore and Potomac Railroad Company and the District of Columbia as to the matters and things involved in this action, and that this action could not be maintained against the said company upon the pleadings and facts in the case; but the court refused to declare the law as requested, and held and decided that the defendant, The Baltimore and Potomac Railroad Company, was liable in this suit upon that state of facts; to which ruling and opinion counsel for the defendant then and there excepted, and the exception was noted at the time.

Thereupon the defendant, by its counsel, to prove the issues on its part, offered as a witness one Carey W. White, who testified
13 that during the years 1870 and 1871 he was ward commissioner of the city of Washington, in charge of the public streets in that portion of the city, and duly inspected the work of

the construction of the tunnel as it progressed; and thereupon defendant's counsel was proceeding to give evidence tending to show that the work of the construction of the tunnel had been done in a skillful manner, and that every reasonable precaution had been used and every care taken by the said railroad company and its officers and agents to prevent accidents to persons and property, whereupon the counsel for the plaintiff interposed and objected, and the court declared its opinion to be that the previous trial and judgment in the said case of William Barnes *vs.* The District of Columbia settled the question of negligence.

And thereupon, it having been conceded by counsel for both sides that K street, at the place where it is alleged the accident to Barnes occurred, is eighty-five feet wide, and that from the building line of the said street to the wall of the tunnel, on either side, the distance is 23½ feet, and that the tunnel walls were two feet wide across the top, counsel for the defendant offered to prove that the ground adjacent to the mouth or western entrance of the tunnel on K street (as shown by the map, marked "Exhibit A," and attached hereto and made a part of this bill of exceptions) was, on Virginia avenue, from seven to fourteen feet higher than the surface of K street, and that during the prevalence of rains surface-water rushed down from Virginia avenue and Seventh street and formed pools of standing water in the street along the side and north of the tunnel wall and about the place of the accident, and that that part of the street was much cut up by the passing of heavily-laden wagons, &c., and that the surface of K street from Sixth to Seventh streets, at this point, rose rapidly towards Seventh street and formed an inclined plane with an angle of nearly forty-five degrees, and that K street, at this location, had never been much travelled prior to the time when the work on the tunnel had been begun, and that in consequence of the drainage from Virginia avenue and Seventh street, upon K street, and the passage of heavy wagons, K street was, during the continuance of the work on the tunnel, in a very bad condition; also that during the progress of the work on the tunnel the excavation was kept well barricaded and protected, and that at the time of the accident a large pile of stones was lying in front of the point where Barnes fell, in such a position that it must have been necessary for him to climb over the said stones before he could get upon the wall of the tunnel, and that the defendant company was under no obligation to erect barricades at the tunnel to prevent accidents, and that in fact the defendant corporation and its agents, servants, and workmen, exercised all the care, skill, and prudence possible under the circumstances to prevent accidents during the progress of the work.

14 But the court refused to admit such testimony or to permit the defendant to give evidence to the jury to that effect, and excluded the same, and the defendant, by its counsel, then and there excepted to the said ruling and opinion of the court, and the exception was duly noted before the giving of the verdict.

The defendant, by its counsel, then rested its defense, and the court instructed the jury, among other things, that "there are three points of fact to be established in the case: (1) the recovery of the judgment against the District of Columbia; (2) the notice to the railroad company; and (3) the identity of the accident and injury of the person that was injured. If you decide all these points in favor of the plaintiff here it would be entitled to recover the amount of the judgment which it has paid." And the defendant, by its counsel, thereupon interposed and objected, and said that the said instructions were erroneous, in authorizing the jury to bring in any verdict (in the first place) and (in the second place) that the plaintiff in the case was not entitled in any event to recover against the defendant for interest paid upon the said judgment, nor for any costs paid on account of the said suit of Barnes *vs.* The District of Columbia, and excepted to the said instructions of the court, and the exception was duly noted at the time and before the giving of the verdict. And after the said instructions by the court and the noting of the exceptions by the defendant's counsel, the jury retired to consider of their verdict, and the verdict was for the plaintiff for the sum of $4,325.35.

And the defendant, by its counsel, asks the court to sign and seal this its bill of exceptions now for then, which is accordingly done this 11th day of April, A. D. 1881.

Witness my hand and seal on the day and date last above written.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

Settled by counsel this 11th day of April, 1881.

ENOCH TOTTEN, *For Def't.*
FRANCIS MILLER, *For Dist.*

Filed Apr. 11, 1881.

(Here follows diagram marked p. 15.)

16 Proceedings before the supreme court of the District of Columbia, in general term, beginning on the fourth Monday, the 26th day, of September, 1881.

FRIDAY, *Dec.* 30, 1881.

Session resumed pursuant to adjournment.
Present: Justices Wylie, Hagner, and James.

DISTRICT OF COLUMBIA, Pl'ff,
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY, Def't.
} At Law. No. 16783.

Now again come here as well the plaintiff as the defendant, by their respective attorneys; whereupon, because it appears to the court here that there is no error in the record and proceedings or in the judgment of the special term, therefore it is considered by the court here that the said judgment be, and the same is hereby, affirmed with costs, the defendant's motion for a new trial upon exceptions to the rulings of the special term notwithstanding.

(Written opinion by Hagner, J.; concurring, the chief justice and James, J.; Wylie, J., not sitting in the case.)

17 In the Supreme Court of the District of Columbia, the 23rd day of January, 1882.

THE DISTRICT OF COLUMBIA
vs.
THE BALTIMORE AND POTOMAC R. R. CO. } No. 16783.

In error.

Know all men by these presents that we, The Baltimore and Potomac Railroad Company, principal, and J. Donald Cameron, surety, are bound unto the above-named District of Columbia in the sum of twelve thousand ($12,000.00) dollars, to be paid to the said District of Columbia or its successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 23rd day of January, 1882.

Whereas the above-named Baltimore and Potomac Railroad Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Baltimore and Potomac Railroad Company shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

BALTIMORE & POTOMAC R. R. CO.,
By J. K. SHARP. [SEAL.]
J. D. CAMERON. [SEAL.]

Sealed and delivered in presence of—
HENRY J. GENSLER.

Approved this 23d ——, 1882.

D. K. CARTTER,
Ch'f Justice.

18 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between The District of Columbia, plaintiff, and The Baltimore and Potomac Railroad Company, defendant, No. 16783, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on he second Monday of October next, in the said Supreme Court to be hen and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 23rd day of January, in the year of our Lord 1882, and of the Independence of the United States the 105th.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *To wit:*

To the District of Columbia:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The Baltimore and Potomac Railroad Company is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

[Seal Supreme Court of the District of Columbia.]

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

[Endorsed:] Law. No. 16783. The Dis. of Col. *v.* The B. & P. R. R. Co. Writ of error and citation.

Service accepted.
Jan'y 23, 1882.

A. G. RIDDLE,
Att'y D. C.

19 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 17th day of September, 1884.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. JAY CAMP,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 17th day of September, 1884.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 17th day of September, 1884.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. JAY CAMP,
Assistant Clerk.

Endorsed on cover: Dist. of Columbia supreme court. No. 304. The Baltimore and Potomac Railroad Company, plaintiff in error, *vs.* The District of Columbia. Filed 18th September, 1884.

Witness my hand and the seal of said court this 17th day of September, 1884.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. JAY CAMP,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 17th day of September, 1884.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 17th day of September, 1884.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. JAY CAMP,
Assistant Clerk.

Endorsed on cover: Dist. of Columbia supreme court. No. 304. The Baltimore and Potomac Railroad Company, plaintiff in error, *vs.* The District of Columbia. Filed 18th September, 1884.

Office Supreme Court U. S.
FILED.
OCT 16 1887
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1887,

THE BALTIMORE AND POTOMAC RAILROAD COMPANY
vs.
THE DISTRICT OF COLUMBIA.
No. 35.

Brief for Plaintiff in Error.

ENOCH TOTTEN,
For Pl'tf in Error.

R. O. POLKINHORN, PRINTER.

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY *vs.* THE DISTRICT OF COLUMBIA.	No. 35.

Brief for Plaintiff in Error.

This action is based upon the asserted existence, on the 14th day of October, 1871, of the relation of master and servant, or superior and inferior between the plaintiff and defendant.

The declaration contains substantially the following averments:

1. That the defendant is a corporation created by an act of the Assembly of Maryland, and is doing business in the District of Columbia.
2. That K street was at that date, and still is, a public highway, which the plaintiff was bound to repair and keep in a safe condition.
3. That the defendant, prior to that date, was duly authorized to and did make an excavation on that street for the purpose of constructing its railroad.

4. That the defendant promised the plaintiff to make such excavation carefully and so as to secure the same by barriers and barricades against accidents, and to secure the plaintiff harmless from loss occasioned by any failure on its part to so secure the work.

5. That on the 14th day of October, 1871, one Barnes, in consequence of the neglect of the defendant to so secure the excavation, fell into the same and was injured.

6. That said Barnes brought his action on the 16th of January, 1872, and recovered a judgment for $3,500.00, which, with costs and interest, amounted to the sum of $4,325.35, and that the plaintiff, on the 29th of April, 1876, was compelled to and did pay the said sum.

7. That on the date last mentioned the defendant promised to pay the plaintiff the sum of money so paid, but has failed to pay it.

8. That the defendant is indebted for money lent, for money paid by the plaintiff at the request of the defendant, and on accounts stated.

To the declaration the defendant pleaded:

First. The statute of limitations.

Second. Never was indebted and never promised as alleged.

Third. That the injury to Barnes was caused, wholly or in part, through the negligence of the plaintiff, the District of Columbia.

The cause came on for trial before MacArthur, justice, and a jury, and the plaintiff read in evidence to the jury the record in the cause of *Barnes* vs.

District of Columbia (see 91 U. S., 540), and gave evidence that the judgment had been paid in April, 1876, by the plaintiff in the case. It also gave evidence to the jury to the effect that Barnes, on the 14th of October, 1871, in the night-time, whilst walking along K street, fell over the north wall of the tunnel of the defendant into the excavation and was hurt, and that the said judgment was recovered therefor. The plaintiff also gave evidence to show that notice of the suit of Barnes had been given to the defendant, and that it had been required and requested to appear and defend that suit, and rested.

The defendant then asked the court to decide that, on the state of facts presented, no recovery could be had ; but the court held otherwise.

The defendant thereupon offered evidence to show that the injury was brought about in consequence of the neglect of the city to provide proper sewerage or other protection against surface water, which, during rains, rushed down from Virginia avenue into K street and formed, at the point where the accident happened, pools of standing water, and also that K street, near the place and at the time of the accident, was much cut up by the passing of heavily laden wagons, and that, as the result of these causes, the public street, at that place, was in a very bad condition. The defendant also offered to prove that *it* was under no obligations to erect barriers, &c., to prevent accidents, but that, in fact, its agents and workmen, during the progress of the work, did exercise all the care, prudence and skill to prevent accidents which it was possible for them to use under the circumstances. All of this testimony was excluded by the court because, in the opinion of the court. the judgment in the Barnes' case concluded the defendant thereon.

Assignment of Error.

First. The court erred in refusing to hold, when requested so to do, that the relation of superior and inferior did not exist between the plaintiff and the defendant at the time of the accident; and also in denying the defendant's motion for a verdict and judgment, and in holding that the plaintiff was entitled to recover on the case presented.

Second. It erred in excluding the testimony offered by the defendant to show that it was not bound to keep the street in safe condition or to erect barricades, &c., during the progress of the work.

Third. It erred in excluding the testimony offered by the defendant to show that it was not chargeable with negligence, and that it and its servants exercised all the care, skill, and prudence possible under the circumstances to prevent accidents.

Fourth. The court erred in excluding the testimony offered to show that the bad condition of the street, which brought about the accident, was attributable wholly or in part to the negligence of the plaintiff.

I.

The relation of master and servant, of agent and principal, or of employer and employed, did not exist between the railroad company and the municipal corporation, in reference to the public work in charge of the former at the time of the accident to Barnes. The declaration in the cause proceeds wholly upon the contrary theory, and alleges substantially, as follows :

That said defendant, at and prior to the said date, was duly authorized to make, and did make on the said "K" street, between Sixth and Seventh streets southeast, a certain excavation for the purpose of constructing its road and laying its track along the said "K" street, and the said defendant promised and undertook to and with the said plaintiff to make the said excavation carefully and in such manner as to guard and secure the same against accident to persons lawfully passing along the said street, and to cover and enclose the said excavation by proper barriers when left open after sunset, and to guard the same by proper lighted lamps or signals, to warn persons passing along the said street of the existence and location of the said excavation, and to save the plaintiff harmless from any loss which should or might accrue from any failure of the said defendant to perform its contract and duty as aforesaid.

There was not a word of proof offerred at the trial to show that any such promise was ever made by the defendant to the plaintiff, or that any relation akin to that of master and servant, principal and agent or employer and employed ever existed between the parties to the cause. The railroad company was in possession of part of the street only, being the centre portion, beginning on either side about twenty-three feet from the building line. It was put in possession of this portion of the street by virtue of an act of Congress, and hence, so long as the company kept within the scope of the law, its powers were superior and not subordinate to those of the municipality. The streets of Washington are in the exclusive control of the legislative authority of the United States. The railroad company was subordinate to the United States only. The original charter granted to the railroad company by Maryland provided as follows :

> "The said road, when completed, not to be more than *sixty-six feet wide*, except at or near its depots or stations, where the width may be made greater, with as many tracks as the president and directors may deem necessary ; and the said president and directors may cause to be made, or may contract with others for making said road or any part of it ; and they or their agents, or those with whom they may contract or their agents, may enter upon and use and excavate any lands which may be wanted for the site of said road or the erection of warehouses, or other works necessary for the said road or for its construction and repair, and that they may build bridges, fix scales and weights, lay rails, may take and use earth, gravel, stone, timber, or other materials which may be needed for the construction and repair of the said road or any of its works, and may make and construct all works whatever which may be necessary and expedient in order to the proper completion and maintenance of said road.

Congress, by the act of February 5, 1876, (14 Stat., 387,) authorized the company to construct its road into the District, and provided that "the said Baltimore and Potomac Railroad Company are hereby authorized to exercise the same powers, rights and privileges, and shall be subject to the same restrictions in the extension and construction of the said lateral railroad into and within the said District as they may exercise or are subject to, under and by intent of their said charter or act of incorporation, in the extension and construction of any railroad within the State of Maryland, and shall be entitled to the same rights, compensation, benefits and immunities, in the use of the said road, and in regard thereto, as are provided in their said charter, except the right to construct any lateral road or roads within the said District from the said lateral branch or road hereby authorized, it being expressly understood that the said Baltimore and Potomac Railroad Company shall have power only to construct from the said Baltimore and Potomac railroad one lateral road within the said District to some point or terminus within the city and county of Washington, to be determined in the manner hereinafter mentioned."

By the act of May 13, 1869, Congress authorized the company to select either of two routes into the city, the second of which was adopted; this second route is described in the act in the language following:

> "Second. Beginning at some point on the northern shore of the Eastern Branch of the Potomac River, between south L and south M streets, thence westwardly between said streets to the intersection of Virginia avenue, northwestwardly, to south K street; thence along said south K street, westwardly, to south Fourth street; thence by a line curving to the right to the north bank of the canal; and thence along the said bank of the canal, northwestwardly, to Virginia avenue; thence along Virginia avenue, northwestwardly, to the intersection of south C and west Ninth streets."

By the provisions of the act of February, 5, 1867, the railroad company is required to preserve the then existing grade or level of the street, "unless Congress shall authorize a different level;" to fix the elevation of the street at that point, the ordinance of the board of aldermen, &c., set out in the record, was passed; it is, however, unnecessary to submit argument to show that this ordinance did not create the relation of master and servant or superior and inferior, between the municipality and the railroad company. It was advisory, only, in reference to the future action of Congress, and was not of any force until sanctioned by Congress, which was not done until May 21, 1872, long after the accident happened to Barnes. (17 Stat., 140.) It was therefore *ultra vires*. In addition to this there was no evidence to show an acceptance on the part of the company of this ordinance.

Before this suit can be successfully maintained by the District of Columbia, against the defendant corporation, the relation of master and servant, of principal and agent, or superior and subordinate, must be shown to have existed. It is wholly immaterial here, whether or not the municipal corporation has or has not paid damages. If a municipal corporation pays a claim of this character rightly, it may recover from its servant or contractor, just as well without as with a judgment. But it is logically accurate to assert that if the District of Columbia was not liable for the *default* of the railroad company in performing the work of constructing this tunnel, the present action cannot be maintained. It is therefore of the first importance to determine, not from the evidence that the municipal corporation *did pay*, but from the established law of the land, whether or not it was liable to answer for the *faults* of the railroad company, arising out of the manner in which the company performed the work of constructing its railroad along this street in pursuance of the act of Congress. It is contended in behalf of the plaintiff in error that the municipal corporation could not have been held liable for damages inflicted upon Barnes by the railroad company, and therefore the judgment must have been rendered against it, because of its own negligence in caring for the public street on which the accident happened. The railroad was, in no sense, the servant, agent, contractor or employee under the municipality, and the latter possessed no authority or control whatsoever over the railroad company, or its agents and servants in discharging the duties in reference to the work of constructing the tunnel. It may be conceded that the company would have been liable to third persons for any injury caused by its want of proper skill or care in constructing the work, yet that fact would be no argument to show that the company could be held accountable to the municipal corporation. The railroad company owed the municipal corporation no duty. The rule on this subject is thus stated by Judge DILLON:

> "When it is sought to render a municipal corporation liable for the acts of servants or agents a cardinal question is whether they are the servants or agents of the corporation. If the corporation appoints or elects them, and can control them in the discharge of their duties, can continue to remove them, can hold them responsible for the manner in which they discharge their trust; and if those duties relate to the exercise of *corporate* powers, and are for the peculiar benefit of the corporation in its local or

special interests, they may justly be regarded as its agents or servants, and the maxim of *respondeat superior* applies."

"On general principles, it is necessary in order to enable a municipal corporation impliedly liable on the maxim of *respondeat superior* for the wrongful act or neglect of an officer, that it be shown that the officer was *its* officer, either generally or as respects the particular wrong complained of, and not an independent public officer while in the legitimate exercise of some duty of a *corporate* nature which was devolved on him by law or by the direction or authority of the corporation." 2 Dill. on Corp., § 974 and notes.

Respondeat Superior.

The doctrine of *respondeat superior* has become an extensive and apparently a very uncertain doctrine, but it springs wholly and exclusively from the well known legal maxium, "*Qui facit per alium facit per se*," and all the uncertainties have grown out of attempts to apply the doctrine to cases which did not warrant the application ; the rule is simple and easily understood. A few well considered cases will suffice to show that the doctrine is correctly stated above, i. e., that it must grow out of and be supported by the existence of the relation of master and servant, principal and agent or employer and employed. The Court of Appeals of New York, has used this language: "The rule of *respondeat superior*, as its terms imply, belongs to the relation of superior and subordinate, and is applicable to that relation wherever it exists, whether between principal and agent or master and servant, and to the subjects to which that relation extends, and is co-extensive with it, *and ceases when the relation itself ceases to exist.*" (*Blake* vs. *Ferris*, 5 N. Y., 54.) The doctrine of *respondeat superior* is predicated upon the right of the employer to discharge and control the servant. (*Kelly* vs. *N. Y.*, 11 N. Y., 432; *Blake* vs. *Ferris*, 5 N. Y., 48.) There can be but one responsible superior for the same subordinate, at the same time, and in respect to the same transaction. (*Laugher* vs. *Pointer*, 5 B. & C., 560; *Blake* vs. *Ferris*, 5 N. Y., 48.) "The doctrine of *respondeat superior* is based upon the right of the employer to select his servants, to discharge them if careless, unskilful or incompetent, and to direct, and control them while in his employ." (*Ham* vs. *Mayor*, 70 N. Y., 459, 462.) The same doctrine has been asserted by this court:

> "The principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of. So long as he stands in the relation of *principal* or *master* to the wrongdoer, the owner is responsible for his acts. *When he ceases to be such, and the actor is himself the principal and master, not a servant or agent, he alone is responsible.*" (*R. R. Co.* vs. *Henning*, 15 Wall., 657.)

The authorities relating to this question are exceedingly numerous; but those who may be desirous of examining the doctrine fully can find the cases collected in Story on Agency, § 454; Wharton on Neg., § 156; Cooley on Torts, 531; Shearman & R. on Neg., 71; 2 Thompson on Neg., 884; Wood on M. & S., Chapter 17; 2 Dill. on Corp'ns, § 974, and notes.

The municipal authority of Washington City had no control over the railroad as to whether it should build the railroad along K street or not, or as to the manner in which the work should be done. The act of Congress conferred upon the railroad company the right to build the road without reference to the corporation of the city of Washington, the then existing municipality, and the city authorities could not stop the work, and could neither hire nor discharge a workman or superintendent, nor in any other manner control the operations of the railroad in respect to the improvement. It seems plain, from these authorities, that the municipal corporation was not and could not have been held liable to Barnes for any injury to him caused by the default of the agents of the railroad company, and it follows from this that the railroad company cannot be liable over to the municipal corporation on the principle of *respondeat superior* ; if held to respond it must be by force of some other principle, or rule of law.

The motion made at the close of the evidence of the plaintiff for a verdict in favor of the defendant, should have been allowed.

II.

The defendant on the trial (10) offered evidence tending to prove :

1. That the defendant was not obliged to erect barricades at the tunnel to prevent accidents ;
2. That in fact, during the progress of the work, the defendant's agents and workmen exercised all the care, skill and prudence possible under the circumstances to prevent accident ;

3. That the accident to Barnes was caused in whole or in part by the negligence of the plaintiff, if by any negligence except that of Barnes.

This evidence so offered was excluded by the court, and there being no more testimony, the court instructed the jury in the following language:

> "There are three points of fact to be established in the case; (1) the recovery of the judgment against the District of Columbia; (2) the notice to the railroad company; and (3) the identity of the accident and injury of the person that was injured. If you decide all these points in favor of the plaintiff here, it would be entitled to recover the amount of the judgment which it has paid."

Objections were heard, and exceptions were taken, and noted to this ruling of the court as to the evidence offered, and to these instructions so given (10, 11). This ruling of the court was erroneous.

It has been established by this Court that on the trial of such a cause it is competent for the defendant to show—

1. That *it* was under no obligations to keep the street adjoining its work in safe condition.
2. That it was not through its fault that the accident happened.
3. That it was the fault of both parties.

(*Robbins* vs. *Chicago*, 2 Black, 418; see, also, *Boston* vs. *R. R. Co.*, 10 Gray, 496.)

The court held that the previous trial "settled the question of negligence" (10), and excluded all evidence offered by the defendant on that subject, although the defendant offered to show, in the first place, that the railroad company itself was under no obligations to provide for the protection of the public from accidents, and, in the second place, that it actually did use all "possible" diligence and care to prevent accidents. And the defendant offered to prove that the accident resulted wholly or in part from the neglect of its duties by the plaintiff. The exclusion of this evidence so offered was erroneous on the part of the court. In addition to this, the court, at the end of the testimony, practically told the jury to find for the plaintiff without reference to the evidence; that the two facts, that judgment had been rendered in favor of Barnes against the District and that it had been paid, without more, entitled the pliantiff to recover from the defendant. The defendant was not concluded by the former verdict on the question as to whether or not it individually, under the existing circumstances, was under obligations to keep the street in a safe condition, nor as to the question whether the complainant did not contribute by its own negligence to the accident. The defendant had also a right to show that it was free from negligence. (*Robbins* vs. *Chicago*, 2 Black, 418; *Boston* vs. *R. R. Co.*, 10 Gray, 496.) This court, in the case of *Robbins* vs. *Chicago*, says the defendant "was not estopped from showing that he was under no obligations to keep the street in a safe condition, and that it was not through his fault the accident happened." It is certainly well settled that if a master employs a servant or workman to do that which, in the doing, necessarily creates a nuisance, the servant will not be liable to the master, if in doing the work he exercises reasonable care, diligence, and proper skill.

The judgment of the court below should be reversed.

ENOCH TOTTEN,
For Pl'tff in Error.

[illegible]
OCT 20 1887
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 35.

THE BALTIMORE AND POTOMAC RAILROAD
COMPANY, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA, DEFENDANT IN ERROR

BRIEF IN BEHALF OF THE DEFENDANT IN ERROR.

HENRY E. DAVIS,
For the District of Columbia.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 35.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA, DEFENDANT IN ERROR.

BRIEF IN BEHALF OF THE DEFENDANT IN ERROR.

I.

STATEMENT OF THE CASE.

This action was begun in the supreme court of the District of Columbia by the District of Columbia to recover of the Baltimore and Potomac Railroad Company the amount recovered by one Barnes and paid to him by the District as damages for a personal injury.

The facts of the case are that Barnes obtained against the District a judgment for injuries sustained by him on the night of October 14, 1871, which judgment, with interest and costs, amounting in all to $4,325.35, the District paid April 29, 1876; that the injuries to Barnes for which he so recovered were occasioned by his falling into an excavation made by the company in the process of constructing a tunnel in one of the streets of the city of Washington (Rec., 7–8); and that before the trial of the cause in which Barnes recovered against the District notice was served upon the proper officers, requiring and requesting the company to appear and defend said cause (9).

The matters sought to be set up by the company in defense of the action are noticed hereinafter in connection with the assignments of error. At the close of the testimony the court instructed the jury, "among other things," in the manner set out in the record (11). What the "other things" were does not appear, but it will be conclusively presumed that they were such as were necessary to authorize the finding of the jury, if anything further than the matters mentioned were necessary to that end. To such of the court's instructions as the record discloses the company excepted on two specific grounds: (1) Because those instructions authorized the jury to "bring in any verdict," by which probably is meant any verdict for the District; and (2) Because in any event the District was not entitled to recover for costs paid by it in the Barnes case, or to interest on the amount of the judgment paid by it (11). As only the former of these objections is stated in the assignments of error the latter might, under the rule of this Court, be dismissed without further notice.

At a special term the verdict and judgment were for the District in the amount paid on the Barnes judgment, with interest from the date of payment (5). On appeal the judgment was affirmed by the court in general term, December

30, 1881 (12), a written opinion being delivered, which, however, is not printed with the record or the brief of counsel for the company. It may be found, with the report of the case, in 1 Mackey, p. 314.

The company sued out a writ of error, which was filed and perfected in the court below in January, 1882 (12–13). The transcript of record was filed in this court September 18, 1884 (14).

At the present term (October 18, 1887,) a motion to dismiss, upon the ground that the cause was not seasonably docketed, was filed by the defendant in error and notice given that it would be presented at the hearing.

II.

THE ASSIGNMENTS OF ERROR.

Whether the several assignments of error submitted by the company are well founded in law is considered in the argument below. But, independent of the substantive merits of the assignments, they present some questions of form and fact to be determined by the record in the light of certain well-defined rules of practice.

1. The company's first assignment of error complains that the court below refused to hold that the relation of superior and inferior did not exist between the District and the company, and that it held that the District was entitled to recover on the case presented.

Of the former part of this assignment it is enough to say that whether the relation mentioned did or did not exist is of no moment, as the declaration contained both a special and the common counts. The latter part of the assignment refers to the company's motion and the court's ruling thereon at the close of the District's testimony (9).

2. The second assignment of error complains that the court refused to admit testimony to show that the company was not bound to keep the street in a safe condition or to erect barricades, &c., during the progress of the work.

The precise terms of the supposed offer of this testimony are as follows: "Counsel for the defendant offered to prove . . . that the defendant company was under no obligation to erect barricades at the tunnel to prevent accidents" (10).

The court cannot consider this assignment of error because—

a. The supposed offer of testimony is not such in fact. It is a general proposal to prove absence of a given obligation, the presence or absence of which is a question of law, dependent upon facts. The facts themselves should have been offered.

b. The supposed offer is one of a set submitted together, without segregation even by the exception. The record shows (10) a continuous offer by the company of testimony of the matters supposed to constitute a defence to the action, viz: (1) that the work of constructing the tunnel was done in a skillful manner and every reasonable precaution taken to prevent accidents; (2) that during the construction of the tunnel the *locus* of the accident was, owing to the drainage of surface water from the neighboring streets and the passage of heavily-laden wagons, in a very bad condition; (3) that during the progress of the work on the tunnel the excavation was kept well barricaded and protected; (4) that the company was under no obligation to erect barricades at the tunnel to prevent accidents; and (5) that the company exercised all care possible under the circumstances to prevent accidents during the work. This composite offer is followed in the record by this statement: "But the court refused to admit such testimony or to permit the defendant to give evidence to the jury to that effect, and excluded the same, and the defendant, by its counsel, then and there excepted to the said ruling." This general exception cannot be availed of to select a given one of the series of matters mentioned, and to argue that its exclusion was error.

3. The third assignment of error complains that the court erred in excluding testimony offered to show that the company was not chargeable with negligence, and that it exercised all care possible under the circumstances to prevent accidents.

If the former part of this assignment be intended to be distinct from the rest it has no foundation in the record. The company made no offer of testimony "to show that it was not chargeable with negligence."

The latter part of the assignment, and the whole of it if it be intended to be single, is open to the same criticisms as its predecessor: the supposed offer does not tender facts, and it is part of a continuous offer of distinct matters not segregated even by the exception.

4. The fourth assignment of error complains that "the Court erred in excluding the testimony offered to show that the bad condition of the street, which brought about the accident, was attributable wholly or in part to the negligence of the plaintiff [the District]."

The short answer to this is that the Court excluded no such testimony. The company's supposed offer in this behalf is in the following terms:

> "That the ground adjacent to the mouth or western entrance of the tunnel on K street . . . was, on Virginia avenue, from seven to fourteen feet higher than the surface of K street, and that during the prevalence of rains surface-water rushed down from Virginia avenue and Seventh street and formed pools of standing water in the street along the side and north of the tunnel wall and about the place of the accident, and that that part of the street was much cut up by the passing of heavily-laden wagons, &c., and that the surface of K street from Sixth to Seventh streets, at this point, rose rapidly towards Seventh street and formed an inclined plane with an angle of nearly forty-five degrees, and that K street, at this location, had never been much travelled prior to the time when the work on the tunnel had been begun, and that in consequence of the drainage from Virginia avenue and Seventh street upon K street, and the passage of heavy wagons, K street was, during the continuance of the work on the tunnel, in a very bad condition." (10.)

It does not appear, nor does this offer hint, that the condition complained of was due to anything the District had done or left undone. For aught that appears, the assumed inequalities of grade and the cutting by the heavy wagons may have been occasioned by the company's work in making the tunnel; indeed, that such was the case is suggested by the assumed facts that the pools of water formed "along the side and north of the tunnel wall," that prior to the beginning of work on the tunnel the street "had never been much travelled," and that its bad condition existed "during the continuance of the work on the tunnel."

III.

ARGUMENT.

1. Upon the motion to dismiss.

This Court has repeatedly declared that it can acquire no jurisdiction under a writ of error where the return to it is made by filing the transcript of record here after the expiration of the term of this Court next succeeding the filing of the writ of error in the court below.

Caillot *vs.* Deetken, 113 U. S., 215.
Steamer Virginia *vs.* West, 19 How., 182.
Mesa *vs.* U. S., 2 Black, 721.
Castro *vs.* U. S., 3 Wall., 46.
The Lucy, 8 Wall., 307.

And the Court will *sua sponte* take notice of this want of jurisdiction, because the writ of error is no longer valid.

Edmonson *vs.* Bloomshire, 7 Wall., 306, p. 308.

The defendant, with its notice of the motion to dismiss, furnished counsel for the plaintiff in error with the foregoing authorities as the support of the motion.

This case presents no one of the exceptional instances in which the Court has sometimes refused to entertain a motion to dismiss at this stage. The judgment below was rendered December 30, 1881. The transcript was lodged here September 18, 1884, over two years and eight months after the judgment. A motion to dismiss made immediately on the lodgment of the transcript must have prevailed, and no new writ could have been sued out.

2. On the merits.

The law of the case is perfectly well settled.

While a municipal corporation, having the exclusive care and control of the streets, is, in a proper case, liable to one who is injured by reason of the defective condition of one of those streets, it yet has a remedy over against a private party who has so used the street as to produce the injury, unless the corporation concurred in the wrong. Such private party is concluded by the judgment against the corporation for his act or negligence, if he knew that the suit was pending and could have defended it, even though he had no express notice so to defend; but he is not estopped to show that he was under no obligation to keep the street in safe condition, or that the injury did not result from his act or neglect, or that the corporation itself was also in fault.

Chicago *vs.* Robbins, 2 Black, 418.
Robbins *vs.* Chicago, 4 Wall., 657.

The verdict and judgment against the corporation, in such case, are conclusive upon the party in original default as to the facts—(1) that the highway was defective; (2) that the person was injured there while using due care, and (3) of the amount of damage by the injury; but not (1) of his liability to keep the place in repair, nor (2) of his having neglected (failed) to do so, nor (3) of his neglect or failure having been the sole cause of the injury.

Boston *vs.* Worthington, 10 Gray, 496.

And it is incompetent for the party in default to prove that in making a dangerous excavation he was guilty of no negligence, or that he properly guarded and covered the same on leaving off work on the night of the injury.

Portland *vs.* Richardson, 54 Maine, 46.

The liability of the party in such cases is for the amount of the judgment against the Corporation, with costs, interest, and counsel fees.

C. & O. Co. *vs.* County Comm'rs, 57 Md., 201.

Other cases illustrating these principles, or some of them, are—

Stoughton *vs.* Porter, 13 Allen, 191.
Woburn *vs.* Henshaw, 101 Mass., 193.
Port Jervis *vs.* First Nat. Bank, 31 Hun., 107.
Troy *vs.* T. & S. Co., 49 N. Y., 657.
Rochester *vs.* Montgomery, 72 N. Y., 65.
Heiser *vs.* Hatch, 86 N. Y., 614.

In view of these principles the assignments of error require but brief attention.

(1) The facts proven clearly entitled the District to recover. It suffered judgment for a fault of the company and paid it.

(2) The proposed offer to show absence of obligation on the company's part was insufficient, for the reasons given above.

(3) The proposed offer to show absence of negligence by the company and that it used all possible care was both insufficient and incompetent.

(4) The fourth assignment has no foundation in fact.

HENRY E. DAVIS,
For the District of Columbia.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, *Pltf. in Error*,
vs.
THE DISTRICT OF COLUMBIA.
No. 35.

Affidavits in Defense of the Motion to Dismiss.

IN THE SUPREME COURT OF THE UNITED STATES.

[October Term, 1887.]

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, *Plaintiff in Error*,
vs.
THE DISTRICT OF COLUMBIA..
No. 35.

DISTRICT OF COLUMBIA, *ss:*

I, Edmund A. Bailey, being first duly sworn, do depose and on my oath say, that from about the first day of December, 1876, to about the first day of June, 1883, I was employed as the clerk and stenographer in the office of Enoch Totten, the counsel for the plaintiff in error in the above-entitled cause, in the city of Washington. That the said Totten, from about the first day of November, 1881, until about the middle of September, 1882, was almost constantly engaged in a series of examinations and trials commonly known as the Star Route Cases, in the Supreme Court of the District of Columbia, and the Police Court of the District of Columbia. That after the judgment in the above-entitled cause was affirmed by the General Term, I was directed by Mr. Totten to cause to be prepared the transcript of the record to be filed in the Supreme Court of the United States, prepare the supersedeas bond, sue out the writ of error, serve the citation, and file the record in the clerk's office of the Supreme Court of the United States. That I promptly undertook compliance with the said directions, caused the transcript to be made, prepared the supersedeas bond, sued out the writ of error, and served the citation upon Mr. Riddle; but, having misunderstood the directions of Mr. Totten, instead of taking the said transcript so prepared and filing it in the clerk's office of the Supreme Court of the United States, I carried it to the clerk's office of the Supreme Court of the District of Columbia, and left the same there for the authentication of the said clerk, with the understanding that he, the clerk of the Supreme Court of the District of Columbia, would transmit the same to the clerk's office of the Supreme Court of the United States; and, thereupon, I dismissed the said duty from my mind, supposing that I had fully complied with the directions of Mr. Totten.

I further state that at the time mentioned, and for some months before, I had been admitted to the Bar, and was a member of the Bar of the Supreme Court of the District of Columbia, and had engaged, to a limited extent, in the practice of the law, and was aiding Mr. Totten in the conduct of his business;

and that I know of my own knowledge that the time of Mr. Totten was nearly, if not quite, monopolized at that period by the aforesaid Star Route Trials.

EDMUND A. BAILEY.

Subscribed and sworn to before me this 19th day of October, 1887.

[SEAL.] RUTLEDGE WILLSON,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

[October Term, 1887.]

THE BALTIMORE & POTOMAC RAILROAD COMPANY, *Plaintiff in Error.*
vs.
THE DISTRICT OF COLUMBIA.
No. 35.

DISTRICT OF COLUMBIA, *ss:*

I, Enoch Totten, being first duly sworn, do depose and say, that I am the attorney for the plaintiff in error, the Baltimore and Potomac Railroad Company, in the District of Columbia, and have been for many years; that I tried the cause for the defendant company in the trial court, and argued it in General Term on appeal. That at the time, judgment of the General Term, in said cause, was rendered, I was much engaged in professional work in reference to the cases in the Supreme Court of the District of Columbia and in the Police Court, known as the "Star Route" cases; that I directed Mr. Bailey, who was then employed in my office, to take the necessary steps to get the cause into this court for review, which he did under my supervision; the *supersedeas* bond was prepared by Mr. Bailey, and then I, as I recollect it, procured the signature thereto, and the approval thereof, and then directed Mr. Bailey to have the transcript of the record completed and the cause docketed in this court. This I relied upon, and I confidently believed that this was done, and it never occured to me that the cause was not so docketed in this court, until about the middle of September, 1884, when I went to the clerk's office of this court, to get the necessary information in relation to it, this cause, and other cases, with the management of which I was charged, to enable me to get ready for argument, and on inquiry for this case, I learned for the first time that the cause was not there. I then immediately began a search for this transcript of the record, and finally found it amongst the files in the cause, in the clerk's office of the Supreme Court of the District of Columbia, and complete in everything except the certificate of authentication. I immediately, and on the 17th of September, 1887, procured this authentication, and had the cause docketed the following day.

Mr. Bailey was employed in my office until sometime in the summer of 1883. At the time Mr. Bailey was so entrusted by me, with the work aforesaid, he was entirely competent to perform the same, and I attribute his failure in the matter, to his misapprehension of what I said to him. I always found Mr. Bailey to be prompt and accurate. I do not think the failure to docket the cause was owing to the *laches* or *want* of *diligence* of the counsel for the plaintiff in error, and the foregoing facts, taken in connection with the statements made by Mr. Bailey, in the affidavit attached to this, are submitted as a fair excuse for the failure to docket the cause in the time usually required.

ENOCH TOTTEN.

Subscribed and sworn to before me, at my office, by Enoch Totten, this 24th day of October, A. D. 1887.

[SEAL.]

RUTLEDGE WILLSON,
Notary Public.